IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

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ORDER

Smt. Kavita Choudhary

vs

State of Rajasthan & Ors.

S.B. CIVIL WRIT PETIITON NO.5510/2003 UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA.

DATE OF ORDER : 18th Sept, 2006

REPORTABLE

PRESENT

HON'BLE MR.MOHAMMAD RAFIQ,J.

Mr.I.R. Choudhary]
Mr.Vikaram Choudhary], Advocates, for the petitioner.
Mr.Rameshwar Dave, Dy. Government Advocate for the respondent-State.
Mr. Harish Purohit, Advocate, for the respondents.

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BY THE COURT: -

In the present writ petition, the petitioner applied for appointment on the post of Physical Teacher Grade-III pursuant to the advertisement dated 28th July, 2003. He is a candidate

belonging to Other Backward Classes (O.B.C.). He secured 76.76% marks as per the merit list prepared by the respondents. According to the petitioner benefit of reservation is provided to candidates belonging to reserved category in order to avoid their competition with general candidates. Only if they are not able to come in the merit against open and unreserved seats, they can be considered for appointment according to their merit placement in particular reserved category. The respondents by misapplying the law governing implementation of rule of reservation have appointed candidates with lesser merit than the petitioner in open category. As against the petitioner 's merit of 76.76%, the respondents have appointed one Ms. Durgesh Nandini in the general category having 76.34% marks and another Ms. Upasna Parihar with only having 76.43% marks. It has therefore been prayed that the respondents be directed to prepare merit list of the candidates for appointment on the post of Physical Teacher Grade-III by considering all the candidates including the candidates belonging to reserved categories against the unserved posts of Physical Teacher Grade-III and if any of the reserved category candidates ranks higher in such merit list then his/her selection should be counted against the general/ unreserved posts of Physical Teacher Grade-III. The respondents should thereafter prepare separate merit list of different reserved categories. It has further been prayed that

the respondents may be directed to consider and appoint the petitioner on the post of Physical Teacher Grade-III as per her merit either as general category candidate or as an OBC category candidate on the basis of her merit and if necessary even by terminating services of the respondent no.4.

The respondents have contested the writ petition and filed reply thereto. In the reply, it has been contended that no candidate having lesser marks than the petitioner in OBC category has been appointed. So far as Ms. Durgesh Nandani and Ms. Upasana Parihar are concerned, both these candidates in their application forms applied against the quota of general category whereas the petitioner had applied against the reserved post of OBC category. According to the respondents, had the petitioner applied against the posts meant for general category, she too would have been considered for appointment against posts of general category. Last candidate who has been given appointment in OBC category has secured 79.67% marks whereas the petitioner 's merit was assessed at only 76.76%.

The question of law posed in the present writ petition came up for consideration before this Court in Jitendra Singh Rawat Vs. State of Rajasthan & Ors. reported in 2006(8) RDD 4129 (Raj.). On consideration of the law on subject, this Court

held that action of the respondents in not considering the candidature of the petitioner in that case against the posts of general category, which were described as unreserved posts, was illegal and unconstitutional and therefore a writ of mandamus was issued directing the respondents to consider his case for appointment.

The respondents in the present writ petition have raised an additional ground in refusing to consider the case of the petitioner against the posts of general category for appointment, which is that her case against general category could have been considered only if she had applied as a general category candidate and since she applied as a candidate belonging to OBC category, therefore, there was no question of considering her candidature in the general category. In view of this argument of the respondents that the application for appointment should have been made against the particular category, I consider it appropriate to examine the matter afresh so as to test the legality of the stand taken by the respondents in the light of settled proposition of law following various judgments of Hon'ble Supreme Court.

The controversy raised in this case has been settled by the Constitution Bench of Hon'ble Supreme Court in Indra Sawhney

Vs. Union of India reported in AIR 1993 SC 477. In para no. 811 of the said judgment, their Lordships held as under : -

> "In this connection it is well to remember that the reservations under Article 16(4) do not operate like a communal reservation. It may well happen that some members belonging to, say, Scheduled Castes get selected in the open competition filed on the basis of their own merit; they will not be counted against the quota reserved for Scheduled Castes; they will be treated as open competition candidates."

The Apex Court following the ratio of Indra Sawhney reiterated the same law in para no.4 of its judgment in R.K. Sabharwal Vs. State of Punjab (1995) 2 SCC 745 in the following terms: -

> "When a percentage of reservation is fixed in respect of a particular cadre and the roster indicates the reserve points, it has to be taken that the posts shown at the reserve points are to be filled from amongst the members of reserved categories and the candidates belonging to the general category are not entitled to be considered for the reserved posts. On the other hand the reserve category candidates can complete for the non-reserve posts and in the event of their appointment to the said posts their number cannot be added and taken into consideration for working out the percentage of reservation. Article 16(4) of the Constitution of India permits the State government to make any provision for the reservation of appointments or posts in favour of any Backward Class of citizens which, in the opinion of the State if not adequately represented in the Services under the State. It is, therefore, incumbent on the State Government to reach a conclusion that the Backward Class/Classes for which the reservation is made is not adequately

> represented in the State Services. While doing so the State Government may take the total population of a particular Backward Class and its representation in the State Services. When the State Government after doing the necessary exercise make the reservation and provides the extent of percentage of posts to be reserved for the said Backward Class then the percentage has to be followed strictly. The prescribed percentage cannot be varied or changed simply because some of the members of the Backward Class have already been appointed/promoted against the general seats. As mentioned above the roster point which is reserved for a Backward Class has to be filled by way of appointment/promotion of the member of the said class. No general category candidate can be appointed against a slot in the roster which is reserved for the Backward Class. The fact that considerable number of members of a Backward Class have been appointed/promoted against general seats in the State Services may be a relevant factor for the State Government to review the question of continuing reservation for the said class but so long as the instructions/rules providing certain percentage of reservations for the Backward Classes are operative the same have to be followed. Despite any number of appointees/promotees belonging to the Backward Classes against the general category posts the given percentage has to be provided in addition."

This very view was later reiterated again by Hon'ble Supreme Court in Ritesh R. Sah Vs. Dr. Y.L. Yamul reported in AIR 1996 SC 1378. In para no. 17 of the judgment, their Lordships held as under: -

> "In view of the legal position enunciated by this Court in the aforesaid cases the conclusion is irresistible that a student who is entitled to be admitted on the basis of merit though belonging to a reserved

> category cannot be considered to be admitted against seats reserved for reserved category. But at the same time the provisions should be so made that it will not work out to the disadvantage of such candidate and he may not be placed at a more disadvantageous position than the other less meritorious reserved category candidates. The aforesaid objective can be achieved if after finding out the candidates from amongst the reserved category who would otherwise come in the open merit list and then asking their option for admission into the different colleges which have bee kept reserved for reserved category and thereafter the cases of less meritorious reserved category candidates should be considered and they will be allotted seats in whichever colleges the seats should be available. In other words, while a reserved category candidate entitled to admission on the basis of his merit will have the option of taking admission to the colleges where a specified number of seats have been kept reserved for reserved category but while computing the percentage of reservation he will be deemed to have been admitted as a open category candidate and not as a reserved category candidate."

Yet another judgment of the Hon'ble Supreme Court again in Yoganand Vishwasrao Patil Vs. State of Maharastra & Ors reported in (2005) 12 SCC 311 reiterated the very same position of law in the following terms: -

> "8.The legal position has been clarified in Ritesh R.Sah that a student, who is entitled to be admitted on the basis of merit, though belonging to reserved category, cannot be considered to be admitted in seats reserved for reserved category but, at the same time, provision should be made that it will not work out tot he disadvantage of such candidate and he may not be placed at a more disadvantageous position than the less meritorious reserved category

> candidate. It was further held that while a reserved category candidate entitled to admission on the basis of his merit will have the option of taking admission in the colleges where a specified number of seats have been kept reserved for reserved category but while computing the percentage of reservation, he will be deemed to have been admitted as an open category candidate. In fairness to the respondent State, it is not being contended before us that because the rule has not been framed, the State government is not required to implement the judgment in Ritesh R.Sah in letter and spirit. In fact, in purported implementation of the decision of this Court, the Director of Medical Education and Research, Mumbai, by communication dated 31.3.2005 sent to its learned advocate i.e. Standing Counsel, has stated that the directions of this Court are being complied with in letter and spirit by the competent authority while making admission to the postgraduate courses."

Their Lordships of the Hon'ble Supreme Court in Union of India & Anr. Vs. Virpal Singh Chauhan reported in (1995) 6 SCC 64 held that "while determining the number of posts reserved for the Scheduled Castes and Scheduled Tribes, the candidates belonging to reserved category but selected on the rule of merit and not by virtue of rule of reservation shall not be counted as reserved category candidates".

In a recently declared judgment in Union of India Vs. Satya Prakash & Ors. reported in (2006) 4 SCC 550 Hon'ble Supreme Court held in para no.18 as under: -

> "By way of illustration, a reserved category candidate, recommended by the Commission without resorting to relaxed standard (i.e. on merit) did not get his own preference "say **IAS**" in the merit/open category. For that, he may opt a preference form the reserved category does not exhaust the quota of OBC category candidate selected under the relaxed standard. Such preference opted by OBC candidate who has been recommended by the Commission without resorting to the relaxed standard (i.e. on merit) shall not be adjusted against the vacancies reserved for the Scheduled Castes, Scheduled Tribes and Other Backward Classes."

The respondents were required to appoint the petitioner against the posts meant for unreserved category on the basis of her own merit by applying the above principles of law. As held by their Lordships of the Hon'ble Supreme Court in Indra Sawhney (supra) "reservations under Article 16(4) do not operate like a communal reservation. It may well happen that some members belonging to, say, Scheduled Castes get selected in the **open competition filed** on the basis of their own merit; they will not be counted against the quota reserved for Scheduled Castes; they will be treated as open competition candidates." (emphasis supplied) The Hon'ble Supreme Court in the case of R.K. Sabharwal (supra) reiterated the same proposition of law when their Lordships held that "the reserve category candidates can compete for the **non-reserved posts** and in the event of their appointment to the said posts their number cannot be added and taken into consideration for

working out the percentage of reservation." (emphasis supplied)

The very same principle was reiterated again in the case of Ritesh R.Sah in which their Lordships held that "that a student who is entitled to be admitted on the basis of merit though belonging to a reserved category cannot be considered to be admitted against seats reserved for reserved category."

Critical analysis of the law referred so discussed would show the underlying philosophy of reservation made in favour of SC, ST and OBC with reference to Article 15(4) and 16(4) of the Constitution of India. These provisions confer certain benefits on the persons belonging to these categories which are not in substitution of any other right, which may be otherwise available to them as citizens of country. Benefit of reservation does not substitute or supplant any other right of a person belonging to SC, ST and OBC. Such benefit would be in addition to an already existing right including the fundamental right of equality. If any scheme of reservation or the procedure evolved with a view to giving effect to such scheme, is made to depend upon the condition of truncating the fundamental or any other right of an individual, such scheme of reservation would be contrary to the constitutional provisions and the law, to the extent it curtails fundamental right or any other right of a person belonging to

such category would be liable to be declared illegal. Reserving certain posts for different groups of the community in the first instance means that these posts are meant for members belonging to such specified group. This is an additional benefit conferred on them. On account of such additional benefit however they are not precluded from claiming ordinary benefits otherwise available to them. Members belonging to SC, ST and OBC for whom reservation of posts is made are not reserved for these posts although its converse is true. They cannot be asked to occupy only reserved posts. They would be free to occupy any posts including unserved posts. However, the requirement of law is that while claiming appointment against unserved posts, they should prove their merit like any other citizen, who is not entitled to the benefit of reservation. No provision of law whether substantive or procedural, can be so interpreted as to run country to this basic tenet of the Constitution of India.

Examined in the light of the settled proposition of law as discussed above, it would be evident that the respondents in the present case have mis-applied the law of reservation. This would be evident from a bare perusal of their reply which shows the respondents have prepared separate merit lists for each of categories, namely, general category, OBC SC and ST. In doing so, they have completely excluded consideration of candidates

belonging to OBC against the vacancies meant for general quota just because the OBC candidates in their application forms requiring them to fill up their category in the relevant column described themselves as belonging to OBC category. The stand taken by the respondents that the case of the petitioner against general posts could have been considered only if she had applied as general category candidate cannot be appreciated in law. There insistence that since she applied only as a candidate belonging to OBC, her case could be considered against the posts reserved for that category alone cannot be approved. Their argument that the petitioner was free to choose either of the two categories and could apply also as a general category candidate is difficult to appreciate in the light of proposition of law settled by series of judgments rendered by Hon'ble Supreme Court. Such a procedure negates their right to consideration in keeping with the spirit of Articles 14 and 16 of the Constitution of India. What are often described as general posts, to borrow the expression used by their Lordships in Indra Sawhney, were in fact "in the open competition filed." Their Lordships referred to them as "non-reserved posts". One can call the category for which these posts belong, as unreserved category. In giving effect to the policy of reservation, the respondents have to broadly divide all posts only in two categories, one unreserved category and another reserved

category. Reserved category can further be sub-divided into categories of OBC, SC and ST. They should first initiate the process of making appointment against the posts of unreserved category. In doing so, they have to consider all candidates irrespective of their category based on reservation whether OBC SC or ST. Having filled up all unreserved post, they can proceed to make appointment against the posts of reserved category in the order of merit from amongst the candidates available at that stage.

Upshot of the above discussion is that action of the respondents in not considering candidature of the petitioner for appointment against the posts of unreserved category (general category) is declared illegal and unconstitutional. The writ petition is therefore allowed. The respondents are directed to consider the case of the petitioner for appointment by placing her appropriately in the merit list of unreserved category (general category) immediately above the candidate, who secured lesser marks than her and if found suitable, appoint her on the post of Physical Teacher Grade-III with effect from the date on which such candidate was appointed. The petitioner shall however not be entitled to any monetary benefits for the intervening period for the reason that she has not actually served the respondents during such period. Her salary shall be

arrived at notionally as if she was appointed on the date on which the candidates shown immediately below her in the said merit list was appointed. She shall however be entitled to seniority from the said date and consequential benefits of promotion and revision of pay scale etc. Compliance of this judgment should be made within a period of three months from the date of service a copy of this order.

There shall be no order as to costs.

(**MOHAMMAD RAFIQ),J.**

c.p.goyal/-